

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No. 99-2496 (GK)
)	
)	Next scheduled court appearance
)	5/26/00
PHILIP MORRIS, INC., <u>et al.</u>)	
)	
Defendants.)	
)	

**UNITED STATES' PROFFER OF PUBLICLY AVAILABLE EVIDENCE
IN SUPPORT OF THE UNITED STATES' OPPOSITION TO
MOTION OF DEFENDANT B.A.T INDUSTRIES P.L.C.
TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION**

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PREFACE

The United States submits this Proffer of Publicly Available Evidence in support of its opposition to the Motion of B.A.T Industries p.l.c. ("BAT") to Dismiss the Complaint Based on Lack of Personal Jurisdiction. This document sets forth factual evidence related to allegations in the United States' Complaint ("Complaint") that BAT^{1/} has participated in a civil conspiracy and a wide-ranging enterprise and conspiracy under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. The United States alleges that through their conspiratorial, tortious, and unlawful conduct, defendants have endeavored to defraud American cigarette purchasers and have caused injury in the United States.

In 1976, BAT succeeded defendant British-American Company Ltd. ("BATCo.") as the ultimate parent company of a conglomerate with a worldwide collection of tobacco operations known as the "BAT Group." Through the corporate reorganization, BAT became the ultimate parent of its U.S. tobacco subsidiary, defendant Brown & Williamson ("B&W"), and assumed the primary leadership role for coordinating smoking and health policy throughout the BAT Group.^{2/}

^{1/} Allegations of the Complaint made against British American Tobacco p.l.c. ("British American") are presumed to have been made against BAT by virtue of the Court's December 17, 1999 Order granting the Joint Motion of Plaintiff and All Defendants for Dismissal and Substitution of Parties.

^{2/} "BAT Group" or "Group" or "BAT Industries Group" are various terms that BAT has itself used to describe the family of its affiliated companies. In late 1998, a corporate restructuring occurred wherein British American was formed to be the ultimate parent of the BAT Group. See Affidavit of Philip M. Cook in Support of Defendant B.A.T Industries p.l.c.'s Motion to Dismiss the Complaint for Lack of Personal Jurisdiction, ¶4 ("Cook Aff."). British American and BAT have stated that BAT continues to exist as a separate corporate entity and remains in the corporate ownership chain. See *Id.* ¶ 9; Joint Report of Parties Concerning Initial Meeting on Scheduling, at 5 (Nov. 12, 1999). As part of the corporate reorganization, defendant BATCo. was renamed British American Tobacco (Investments) Ltd. Cook Aff. ¶ 4.

The publicly available evidence^{3/} indicates that BAT was cognizant of the threat that research concerning the association between smoking and health, American smoking and health litigation, and civil discovery posed for itself, its subsidiaries, and the entire tobacco industry. Because of this, available documents indicate that BAT took steps to cooperate on smoking and health issues with other defendants named in this case. There is also substantial evidence that BAT took an active role in establishing, implementing, and distributing a uniform set of policies to its subsidiaries on smoking and health, and that BAT utilized its position as ultimate parent to influence the type of research undertaken by its subsidiaries.

This Proffer summarizes the available evidence regarding the methods and means used by BAT to operate its business. As BAT's leadership, policies, and organizational structures overlapped with those of BATCo., the Proffer also presents factual information that demonstrates this continuity in corporate structure and conduct. Additionally, the Proffer highlights events relevant to the course of conduct which the United States alleges has been undertaken by BAT in furtherance of defendants' conspiracy.

^{3/} This Proffer is supported by over 250 exhibits, submitted concurrently herewith. The Proffer cites to an exhibit as "Ex. ___." Although some of the documents included are stamped "confidential," all documents submitted are publicly available in public court files, in document depositories, or on various Internet web sites. The United States has not taken discovery of BAT in this case, and this Proffer by no means exhausts the available evidence that could be developed after adequate discovery. In addition, for ease of reference and the convenience of the Court and BAT, a copy of this Proffer has been submitted on a CD-Rom, which can be read in Adobe Acrobat format, with hyper links in the electronic text to exhibits specifically relied upon in the Proffer. The content of the hardcopy and electronic versions is identical; however, the format and pagination in the two versions may differ slightly because of technical requirements for the electronic version.

I. NATURE OF THE ACTION

In this action, the United States seeks monetary and equitable relief for the defendants' almost fifty years of conspiratorial, fraudulent, tortious, and illegal conduct. United States' Complaint for Damages and Injunctive and Declaratory Relief, ¶ 1 ("Compl."). The United States alleges that all defendants in this case participated in the affairs of an association-in-fact enterprise that was originally formed by five U.S. cigarette companies no later than 1953, in order to preserve and expand the market for cigarettes and to maximize profits. Id. ¶¶ 4, 34, 172-198. The Complaint alleges that the original members of the enterprise and conspiracy included B&W, now a wholly owned subsidiary of BAT, and American Tobacco Company ("American Tobacco"), which was purchased by BAT and merged into B&W in 1994. Id. ¶¶ 32, 15. The Complaint alleges that defendants participated in a civil conspiracy and conspired to, and did, engage in a pattern of racketeering activity, including numerous acts of mail and wire fraud, all in violation of RICO, 18 U.S.C. § 1962(c) & (d). Id. ¶¶ 172, 204, 206; Appendix to Complaint ¶¶ 1-116 ("App.").^{4/}

The United States alleges that BAT, in concert with the other defendants, has engaged in a course of conduct that has caused cigarette smokers to suffer dangerous disease and injury. Compl. ¶ 6. The United States further alleges that in conspiracy with the other defendants, BAT has long denied the harmful health effects caused by smoking, despite longstanding knowledge to the contrary. Id. ¶ 3. The United States further alleges that BAT has denied that cigarettes are addictive even though it has also long known of and attempted to exploit the addictive properties

^{4/} The Appendix to the Complaint contain 116 racketeering acts that the United States alleges were undertaken by defendants in furtherance of the aims of the enterprise.

of nicotine. Id. The United States alleges that to avoid discovery of and accountability for its fraudulent conduct, BAT has concealed material information, documents, and research that would expose its unlawful activities to public scrutiny. Id. ¶ 5.

The United States further alleges that BAT controlled and directed research of its English subsidiary BATCo. on smoking, disease, and addiction, and utilized its position as an overseas parent to B&W to keep potentially damaging documents, research and information out of reach of courts and others in the United States. Id. ¶¶ 41, 51. The Complaint alleges that all members of the enterprise, including BAT, have suppressed the development, testing, and marketing of less hazardous products. Id. ¶ 180.

The Complaint alleges that all of these activities were done by BAT as part of an unlawful scheme or artifice to obtain money and property from members of the public by way of material false and fraudulent pretenses, representations, and promises. Id. ¶ 204. It is further alleged that BAT implemented this scheme to defraud in part through use of mail and wire transmissions. Id., App. ¶¶ 55, 59, 101, 108.

Finally, the United States alleges that BAT continues to profit from its unlawful conduct, and that the effects of that conduct continue to the present. Compl. ¶ 6. The United States alleges that BAT continues to engage in unlawful activity, and unless restrained, is likely to continue its harmful and illegal activities into the future. Id. ¶¶ 6, 207-210.

II. PUBLICLY AVAILABLE DOCUMENTS DESCRIBE BAT'S POSITION AND CONDUCT ON SMOKING AND HEALTH ISSUES AND ON THE ROLE AND EFFECTS OF NICOTINE.

BAT's public financial reports indicate that BAT has received billions of dollars in profits derived from the sale of cigarettes in the United States by defendants B&W, BATCo., and, since

the mid-1990's, American Tobacco. Ex. 259-266. The allegations of wrongful conduct in the Complaint are supported by documents detailing the knowledge of BAT and officers, directors, and scientists throughout the BAT Group about smoking and health and about nicotine's addictive properties. This Proffer also includes documents that describe BAT's policies on the handling of scientific research documents on these subjects by its subsidiaries across the world.^{5/}

^{5/} BAT was aware of the smoking-related litigation in the United States and its potential impact on BAT. R.G. Baker, a Solicitor at BAT, wrote to an attorney at another United States subsidiary, BATUS, in February 1985 :

Following our conversation last week on the attribution issue I think it worthwhile taking our investigation of this matter a stage further by looking, in some detail with Counsel, at the statements and positions which companies outside the USA would like to take from time to time, and produce some rather more specific guidelines than the general discussion which we had in Louisville last May. Clearly the issues with which we are concerned are the following:

- (1) Does this particular statement amount to an admission?
- (2) Does this particular statement amount to product assurance which can be attributed to an affiliated US defendant?
- (3) Is this statement admissible in cross examination of defendants' witnesses?
- (4) Are statements of this type by non-US affiliates discoverable?
- (5) What are the risks of overseas companies becoming parties of US cases? Is their public posture relevant to this question?
- (6) Given the range of company activities in the Group, what are the risks associated with expert status being attributed to employees of certain companies in the Group?

Ex. 1 at 1-2. Attached to Baker's letter is a document that discusses the potential effects of BATCo. research on litigation in the U.S.:

To the extent that the close functional relationship is presumed if one company routinely receives quantities of regular operating, or scientific information which would otherwise be confidential, BATCo is probably already established in an inextricably close functional relationship with T which would be confirmed, on discovery, by the disclosure of BATCo's scientific position papers and the pooling of research work. The depositions is [sic] the New Jersey cases are likely to bring BATCo's

A. Knowledge About the Health Effects of Smoking

The publicly available evidence shows that BAT's top management had extensive background and interest in smoking and health issues. In 1976, the directors of BATCo., a company which had researched, manufactured, and marketed cigarettes, became the directors of BAT. Ex. 2 at 3. Sir Patrick Sheehy, who became BAT Chairman in 1982, brought to BAT the knowledge he had amassed in over thirty years with BAT Group companies. Sheehy had taken a strong and active role on smoking and health issues as the BATCo. chairman from 1976-82. See, e.g., Ex. 3. Sheehy continued his similar involvement on these issues as BAT Chairman. Ex. 4.

In October 1976, soon after BAT assumed ownership of the BAT Group and Sheehy became BATCo.'s chairman, BAT officers and directors received reports on smoking and health from Dr. Sidney J. Green, the head of Research & Development at BATCo. and a member of the Tobacco Division Board of BAT. Ex. 5 at 690105283. Dr. Green wrote several papers addressing the state of the evidence on causation and the considerations underlying the position of the entire tobacco industry, including BAT, to deny the link between smoking and disease. In one of these papers, Green noted:

The public position of the tobacco companies with respect to causal explanations of the association of cigarette smoking and diseases is dominated by legal considerations. In the ultimate companies wish to be able to dispute that a particular product was the cause of injury to a

science into the cases although it may [sic] be possible to resist BATCo being joined as a party for much longer.

The real risk of attribution is if documents show that someone other than Brown & Williamson had the final decision. For this reason documents likely to be sent to T must be subject to legal review before originated.

Ex. 1 at 4 (emphasis added).

particular person. By repudiation of a causal role for cigarette smoking in general they hope to avoid liability in particular cases. This domination by legal consideration thus leads the industry into a public rejection in total of any causal relationship between smoking and disease and puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research, etc. Companies are actively seeking to make products acceptable as safer while denying strenuously the need to do so. To many the industry appears intransigent and irresponsible. The problem of causality has been inflated to enormous proportions. The industry has retreated behind impossible demands for "scientific proof" whereas such proof has never been required as a basis for action in the legal and political fields. Indeed if the doctrine were widely adopted the results would be disastrous.

Ex. 6 at 1 (emphasis added). Dr. Green concluded:

In summary, for social policy purposes it is sensible and totally relevant to use the experimental evidence pertaining to large groups and also to select the simplest hypothesis. It may therefore be concluded that for certain groups of people smoking causes the incidence of certain diseases to be higher than it would otherwise be.

Id. at 4 (emphasis added).

Two years later, in preparing for a Chairman's Advisory Conference, an annual conference sponsored by BAT to discuss, inter alia, smoking and health issues,⁹ Dr. Green wrote:

There has been no change in the scientific basis for the case against smoking. Additional evidence of smoke dose-related incidence of some diseases associated with smoking has been published. But generally this has long ceased to be an area for scientific controversy.

Ex. 7 at 1 (emphasis added). Dr. Green made the same statements in a restricted distribution memorandum concerning the BAT Group's Research and Development Conference in 1978. Ex. 8.

⁹ For discussion of the Chairman's Advisory Conferences, see infra Sec. III.D.4.

Also in 1978, Dr. Green presented to the Tobacco Division Board^{7/} statements that a subsidiary of American Tobacco had made: "The Statements are made that studies have shown that lung-cancer death rate is almost directly related to the number of cigarettes consumed . . . [That] statement is clearly true." Ex. 9.^{8/} Numerous other documents evidence knowledge that statements being made about "open controversies" concerning smoking and health were demonstrably false. See, e.g., Ex. 6, 9-18.^{9/}

^{7/} See infra Sec. III.D.2. for discussion of the Tobacco Division Board and the role it played in the smoking and health controversy for BAT.

^{8/} Another document by Green, apparently written after issuance of the 1979 Surgeon General Report, drew a similar conclusion on the question of causation.

Scientific proof of course, is not, should not be and never has been the proper basis for legal and political action on social issues. A demand for scientific proof is always a formula for inaction and delay and usually the first reaction of the guilty. . . .

Ironically, the position of the tobacco companies is dominated by legal considerations While vigorously trying to get their cigarettes endorsed as safer or seen to be safer or even to make them safer, companies strenuously deny the need to do so. The industry has publicly retreated behind impossible, perhaps ridiculous, demands for what in their public relations is called "scientific proof". . . .

If it can be reliably predicted that if smoking is decreased in a population that the incidence of this or that disease will be decreased then the decrease demonstrates the causal relationship. Thus for male smokers in the U.K., the U.S.A., and several other countries from the epidemiological evidence alone it can be concluded that smoking cigarettes causes lung cancer and some other respiratory diseases. . . .

Ex. 10 at 1-2, 4-5.

^{9/} Shortly after his retirement from BATCo., Dr. Green appeared on British television admitting that causation had been proven. See Ex. 3, 20-24. BATCo. Chairman Sheehy himself denied that BATCo. agreed with Green in a strongly worded letter to the BBC the night that the program aired. Ex. 3. Sheehy stated that "there are other scientists who do not share the opinion

In the early 1980's, there was discussion within the BAT Group of companies regarding whether to change course on smoking and health issues, and in particular whether or not to publicly admit causation. By May 1980, a time when Patrick Sheehy was BATCo.'s chairman, several senior BATCo. managers and boardmembers were reviewing suggestions for a new policy on smoking and health for the BAT Group, and several memoranda were prepared. See Ex. 19. At least one of these memoranda discussing the adoption of a new position on causation was sent to C.H. Stewart Lockhart who sat on BAT's Board of Directors. This report stated:

- (m) The company's position on causation is simply not believed by the overwhelming majority of independent observers, scientists, and doctors
 - (o) The industry is unable to argue satisfactorily for its own continued existence, because all arguments eventually lead back to the primary issue of causation, and on this point our position is unacceptable
- ***
- (e) No individual can argue successfully unless his integrity is unquestionable. In the view of the forces ranged against us, our integrity is seriously in question over our position on causation
 - (f) Our position on causation, which we have maintained for some 20 years in order to defend our industry is in danger of becoming the very factor which inhibits our long term viability

Dr. Green expressed on the programme." Sheehy did not name any BAT Group scientists who disagreed with Dr. Green. Three of the four people he did name — Alvin Feinstein, Theodor Sterling, and Gary Huber — had received substantial joint funding from the American tobacco industry, including through the Council for Tobacco Research ("CTR") (a defendant in this case), for lawyer-directed "Special Projects." Ex. 25 at 5884, 5910-5914; Ex. 184. The fourth person Sheehy identified, Prof. P.R.J. Burch, was at times a paid consultant of defendants in the United States and was closely associated with Special Projects researchers. Ex. 62. Another senior BATCo. employee, Dr. L.C.F. Blackman, called Green's public statements "an act of treachery." Ex. 20.

4. COURSES OPEN TO US

- a) We can continue to maintain our present position on causation.

Advantages

Our legal position in the USA will remain intact . . .

Disadvantages

- We will continue to be met with incredulity whenever we make the statement.

- b) We can move position on causation to one which acknowledges the probability that smoking is harmful to a small percentage of heavy smokers.

Advantages

- Credibility will be restored to the industry.
- The notion of a 'safer' cigarette will greatly assist us in the tapping the projected population growth of less developed countries by the year 2000.

Disadvantages

- If the predictions of the U.S. lawyers are correct, we could lose a cancer suit, and this could lead to a new "industry" in America and elsewhere, that of suing tobacco companies costing a lot of money.

New Strategy

- On balance, it is the opinion of this department that the analysis of advantages and disadvantages suggests that we should now move to position B, namely, that we acknowledge 'the probability that smoking is harmful to a small percentage of heavy smokers.'

Conclusion . . . The problem to date has been the severe constraint of the American legal position. This problem has made us seem to lack credibility in the eyes of the ordinary man in the street. Somehow we must regain this credibility. By giving a little we may gain a lot. By giving nothing we stand to lose everything.

Ex. 26 at 2-6, 10 (underline in original).

As alleged, BAT chose to reject the course urged above for itself and its subsidiaries. In 1996, for example, BAT Chairman and Chief Executive Martin Broughton announced, "We haven't concealed, we do not conceal and we will never conceal. We have no internal research which proves that smoking causes lung cancer or other diseases or, indeed, that smoking is addictive." App. ¶ 101. There is additional evidence of BAT officers and directors participation in the BAT Group's internal debate whether to change course. See, e.g., Ex. 27 (July 1982 Chairman's Advisory Conference attended by members of BAT board in which smoking issues were the main topic of two days' of discussion, including what "the Group [should] do about the credibility of the industry").

B. Knowledge of Nicotine's Addictive Properties

The available evidence indicates that high ranking officers and directors of BAT were aware of nicotine's pharmacological properties and its important role in cigarette smoking. Indeed, BATCo., the entity assigned by BAT to coordinate all research for the BAT Group (Ex. 28 at 25), had in its files scientific documents dating from at least 1962 that characterized nicotine as an addictive substance. Ex. 29-32.

Much more recently, a BATCo. researcher at the centralized research and development facility in Southampton wrote:

A cigarette as a 'drug' administration system for public use has very, very significant advantages: Speed: Within ten seconds of starting to smoke, nicotine is available in the brain Low dosage: The delivery of nicotine from the puff is about 0.1 mg of the active agent. Thus, we have an emerging picture of a fast, highly pharmacologically effective and cheap "drug", tobacco. So, all in all, it is a relatively cheap and efficient delivery system, legal, and easily usable.

Ex. 33 at 1-2 (underline in original). After discussing how best to establish dosages in the

nicotine, the author commented:

Let us provide the exquisiteness [sic], and hope that they, our consumers, continue to remain unsatisfied All we would want then is a larger bag to carry the money to the bank.

Ex. 33 at 10 (emphasis added). Concluding his memo, the author did not urge BATCo. to attempt to remove known hazardous components of cigarette smoke, but rather encouraged BATCo. to exploit "smoker compensation," the practice by which human smokers — but not smoking machines used by regulatory authorities to measure tar and nicotine levels — modify the way they smoke cigarettes to ensure sufficient nicotine delivery.

From what I have said in the preamble, you will understand that I do not consider that there is a lot of sense in continuing to drive for ever lower tar. . . . What would seem very much more sensible, is to produce a cigarette which can be machine smoked at a certain tar brand, but which, in human hands, can exceed this tar banding. Such is the case with Barclay. However, Barclay is an extreme example of this "elasticity" of delivery, and this may very well be why other manufacturers have spent so much money lining lawyer's pockets in attempts to get it banned.

Ex. 33 at 11 (emphasis added).

When the Chairman of BAT, Patrick Sheehy, directed the Tobacco Strategy Review Team of BAT ("TSRT")¹⁰ to provide him with an assessment of the impact of emerging nicotine replacement therapies on the cigarette business (Ex. 35), a preliminary report circulated among TSRT members indicated one possible "disadvantage" of nicotine gum as being "addiction." Ex. 36. Additionally, various individual responses from TSRT members compared cigarettes as a mechanism for nicotine delivery to other nicotine delivery products that are classified as drugs requiring pre-market approval by the United States Food and Drug Administration. See Ex. 36-

¹⁰ The TSRT was a body created and run by BAT to "mount[] a coherent strategic thrust in Tobacco." Ex. 34 at 1. Additional discussion of the TSRT is infra Sec. III.D.3.

This internal characterization of nicotine as an addictive substance differed from statements directed to the public by BAT's subsidiaries. For example, BATCo., directed to coordinate tobacco policies for the BAT Group, circulated answers to smoking and health questions for consumer helpline operators. Ex. 50. BATCo. made clear that these were official policies, not suggested answers — "under no circumstances should operators be permitted to exceed the content of these Q&A documents." *Id.* at 4. In response to the question "Do you believe tobacco is a drug?" operators were instructed to answer, "We believe that it is not" And to the follow up, "[W]hat can you say about the addiction produced by cigarettes?" the prescribed answer was, "The mere fact that people say it is difficult to stop doing something, such as smoking cigarettes, does not mean that behaviour constitutes an addiction. . . ." *Id.* at 11.

C. BAT's Conduct Regarding Smoking and Health

The United States has alleged that when BAT became the parent company of the BAT Group in 1976, it utilized the strategy and tactics of other defendants in this case, who had

^{11/} Similarly, when in 1992 BAT hosted a meeting at which BATCo. contemplated researching whether smoking had beneficial health effects, the implications of such research were discussed:

This would lead to the scientific identification of nicotine as a compound of considerable 'benefit,' confirming the rather anecdotal nature of current evidence. This would clearly be of value to BATCo. and the tobacco industry, but might further encourage the interest of the pharmaceutical industry in nicotine. If there was a satisfactory outcome to this research this would further activate research into options for delivering nicotine to people and again would require decisions as to which business we are in.

Ex. 37 at 3.

consistently promoted a false "controversy" regarding the health risks of smoking in prior decades despite overwhelming scientific evidence to the contrary. Compl ¶¶ 34-36, 173-174, 176. From 1976 on, BAT repeatedly promulgated smoking and health policies to the entire BAT Group that mirrored the public statements made by its alleged co-conspirators. See, e.g., App. ¶¶ 55, 42, 43, 64, 79. When necessary, BAT communicated directly with other members of the conspiracy, in addition to its affiliates, in order to promote the aims of the conspiracy. See, e.g., Id. ¶¶ 59, 108. The following are representative examples of such conduct derived from publicly available evidence.

1. Promulgating World-Wide Smoking and Health Policy: The BAT Board Guidelines

For a number of years, BAT regularly circulated, under its letterhead, detailed strategy papers on smoking issues for its subsidiaries around the world, including for defendants BATCo. and B&W. See Ex. 51 (Letter from BAT to B&W noting, "As in previous years I enclose a copy (No. 90) of the above document for your interest.").^{12/} The 1982 edition, "BAT Board Guidelines Public Affairs," every page of which is stamped "Secret,"^{13/} directly acknowledges the importance

^{12/} In other smoking and health and cost recovery actions in the United States, BAT has alleged that the guidelines referred to above were promulgated by defendant BATCo., not by BAT. However, the guidelines purport to direct the activities of all companies within the BAT Group, of which BAT was the ultimate parent. BAT specifically charged the BATCo. Board to carry out such tasks for it: "It was noted that the BATCo. Board is charged by B.A.T Industries with developing, agreeing and coordinating the key strategies for its tobacco activities." Ex. 28 at 25; see also Ex. 52.

^{13/} In addition to being "secret," the April 1982 cover letter distributing the 1982 version of the guidelines to B&W noted: "Copies in your possession of the 1981 version of B.A.T Board Strategies on Smoking Issues should now be destroyed." Id. The letter went on to note that public relations material in the Guidelines "can and should be used to explain to employees, government authorities, the media and the public our position on the various issues." Id.

of maintaining a united industry front on smoking and health issues:

It is essential that, on Smoking Issues, the industry speaks with one voice. In this connection, companies -- without jeopardising commercial competitiveness in any way -- should strive to have good relations and reach agreements with other members of the industry in the area of Smoking Issues. In countries with more than one manufacturing company, companies should press for the establishment of National Manufacturers Associations where these do not already exist. Until an NMA is formed, the nominated "lead company" should take the lead in co-ordinating action on smoking issues between members of the industry.

Id. at 2 (Smoking Issues, Assumptions Par II General Strategies, ¶ 3.3) (emphasis added).^{14/}

This mandate from BAT was built on a series of "assumptions" that it made about smoking and health, assumptions which were to be kept secret by its subsidiaries, including:

10. The tobacco industry will only be able to defend itself adequately

^{14/} The United States has alleged that industry-created and -controlled associations, such as the Council for Tobacco Research and Tobacco Institute, were utilized in the United States by defendants as a public relations tool for carrying out the aims of the enterprise, including to publish false and misleading information about the health risks and effects of smoking, and to present a united defense against the scientific evidence regarding cigarette smoking as a cause of human illness. Compl. ¶¶ 56-69, 178, 184-198.

There is evidence indicating that BAT was similarly involved in supporting research of peripheral value to the smoking and health question. In a memorandum about the 1983 BAT Group Research Conference, Dr. L.C.F. Blackman, BATCo.'s Head of Research and a BATCo. boardmember during the late 1970s and early 1980s, wrote that "the possibility that BAT Industries might provide some financial support to the comprehensive research project of Prof. Ivor Mills at Cambridge into compulsive excessive behavior . . . was discussed. Although the results are unlikely to have relevance to normal smoking . . . it was agreed that, subject to lawyer approval, there was public relations merit in supporting the project." Ex. 53 at 11 (emphasis added). In another instance, S.J. Green sent Chairman Sheehy a note cautioning him that a BATCo. plan to set up an external pool of subjects for a smoking psychology program at its research facility might have unfortunate public relations consequences. Dr. Green suggested that "any dangers here could be reduced by some 'front' activity which does not concentrate on smoking and further that this could even be real and useful. I would like to find out now therefore if B.A.T Industries name could be used in principle either as a front or for real." Ex. 54.

against attack if it presents a united response.

11. Competitors will honour industry agreements if it is to their advantage to do so.

Ex. 51 at 2 (Smoking Issues, Assumptions ¶¶10-11).

The many other assumptions and directives contained in the 1982 BAT Board Guidelines are illustrative of the level of direct involvement of BAT in issues concerning smoking and health, biological evidence, nicotine manipulation, and other issues which are at the center of the United States' allegations in the Complaint. Id.^{15/} Additional documents indicate that similar involvement continued throughout the 1980's and 90's.

2. BAT's 1983 Accusation that Philip Morris Undermined Industry Cooperation on Smoking and Health Issues

In 1983, BAT accused Philip Morris of undermining industry-wide cooperation on smoking and health issues, and communicated its view that adherence to that position was critical. App. ¶¶ 59, 108. Philip Morris had run an advertisement in Holland in which it "raised the health issue to gain competitive advantage" and "endorsed a report of an anti-smoking lobby."

Ex. 57. Sir Patrick Sheehy, Chairman of BAT, sent a letter to Philip Morris' headquarters in the United States, detailing the implications of this apparently unprecedented conduct:

Philip Morris Holland B.V. recently took out full-page newspaper ads in

^{15/} In later years, BAT decided that, to protect itself from potential liability, the smoking and health guidelines issued by it should not be so specific. After addressing BAT's guidelines regarding research and development, the following observation was made: "The extent of holding company liability for the actions of subsidiaries under product liability legislation will be examined. It may be necessary for S&H [i.e., smoking and health] guidelines to be more general." The memorandum directed the public affairs and legal departments to undertake this review. Ex. 55 at 0014121, ¶ 9. Similarly, under the direction of Patrick Sheehy, BAT's Tobacco Division Board (described infra Sec. III.D.2) changed one area of its responsibility from "Smoking and Health" to the more neutral-sounding "Smoking Issues." Ex. 195 at 2.

violation of Dutch law to republish an anti-smoking group's slander of Barclay. . . .

I find it incomprehensible that Philip Morris would weigh so heavily the short-term commercial advantage from deprecating a competitor's brand while weighing so lightly the long-term adverse impact from an on-going anti-smoking programme. I believe this is the first time a Tobacco Manufacturer has purchased space to promulgate the anti-smoking position. In doing so, Philip Morris not only makes a mockery of Industry co-operation on smoking and health issues, but also appears to inaugurate a free-for-all in which illegal conduct is condoned provided the commercial stakes are high enough. . . .

Ex. 58 (emphasis added).

A follow-up telephone call on this same matter from a BAT director to Philip Morris's Hugh Cullman contains further evidence of BAT's association with the American tobacco industry. Eric Alfred Albert Bruell, in his capacity as a BAT director, conditioned BAT's acceptance of Philip Morris's proposed plan to correct its Holland behavior on the legal approval of Don Hoel, a leading American tobacco industry lawyer with the Shook, Hardy, & Bacon firm in Kansas City, Missouri.^{16/} Bruell emphasized that it was "essential to ensure that in future [sic] no member of the Industry does anything similar." Ex. 59.

3. The 1984 "Legal Considerations on Smoking and Health Policy"

A March 1984 BAT policy document, "Legal Considerations on Smoking and Health Policy," provides further evidence of efforts by BAT to promote its position on smoking and health. Ex. 60. The documents also show that BAT recognized that its efforts on such matters were tied to the other defendants. This policy directive was later incorporated into BAT's

^{16/} As alleged, Hoel had extensive contact with attorneys for the defendants in the United States in order to coordinate the execution of CTR "Special Projects." See App. ¶¶ 31, 32, 38, 40, 51, 66, 69, 70, 80.

"Statement of Business Conduct" and compliance with it by all BAT Group companies was mandatory. Ex. 61. Consistent with the United States allegations about the fundamental objectives of the alleged enterprise (Compl. ¶¶ 3, 174, 176), BAT acknowledged that the "open controversy" position was in large part informed by liability considerations:

Legal Considerations on Smoking & Health Policy

This note summarises the policy of BAT Industries Group in relation to smoking & health issues. Although primarily the concern of the Group's tobacco interests, it is important for senior executives in other parts of the Group to be aware of the stance taken. This is because the spread of 'strict' or 'no fault' liability in the USA, Europe and other industrialised parts of the world may in the future result in the attribution to the Group's tobacco companies of statements made or decisions taken by other BAT Industries subsidiaries. . . .

The issue is controversial and there is no case for either condemning or encouraging smoking No conclusive scientific evidence has been advanced and the statistical association does not amount to proof of cause and effect. Thus a genuine scientific controversy exists.

The Group's position is that causation has not been proved and that we do not ourselves make health claims for tobacco products. . . .

Non-tobacco companies in the Group must particularly beware of any commercial activities or conduct which could be construed as discrimination against tobacco or tobacco manufacturers (whether or not involving companies within the Group), since this could adversely affect the position of Brown & Williamson in current US product liability litigation in the US.

Ex. 60 at 2 (emphasis added).

This policy was promulgated by BAT at a time when the overwhelming scientific evidence available to it on the health effects of smoking — evidence known to BAT's leadership who had worked in the smoking and health field for years — conflicted with BAT's official stance on causation. See supra Sec. II.A.

A few months after BAT promulgated its "Legal Considerations on Smoking and Health Policy," Keith Richardson of BAT wrote a memo to R.E. Thornton, a senior researcher of BATCo., that emphasized the existence of the "controversy" and suggested that a short book "casting doubt on the relationship between smoking and lung cancer" be written to publicize BAT's view:

There exists a major controversy about smoking and health. But although many people believe that the "case for the prosecution" is absolutely clear cut and proven, the hard fact is that there are many anomalies in the evidence. . . .

There can be no doubt that this is widely believed to be true and that lung cancer is the most emotive single issue. If we can cast doubt on the relationship between smoking and lung cancer then we have cast doubts on the entire case against smoking. So let us look at the evidence on lung cancer in more detail.

Ex. 64. The memo, a twenty-point outline of "open controversy" arguments, discusses smoking rates and statistics, demonstrating BAT's detailed understanding and active involvement in maintaining the "open controversy."

. Other documents indicate that the "Legal Considerations" was consistent with BAT's position and conduct on this issue over time. For example, in December 1986, the Chairman of BAT, Patrick Sheehy, issued a memorandum on smoking and health to principals at tobacco companies worldwide urging their widespread circulation of a paper issued by a controversial scientist which rebutted a study attributing deaths to cigarette smoking. Ex. 4 at 1. Additionally, in February 1990, the TSRT of BAT reviewed and approved publications of two new smoking issues documents, "Smoking: Habit or Addiction?" and "Smoking and Health, the Unresolved

Debate." The TSRT ordered that they be updated and reviewed annually. Ex. 65 at ¶ 15.^{17/}

4. BAT's 1993 Reinforcement of Smoking And Health Policy

The publicly available evidence also demonstrates that, as recently as 1993, BAT's

^{17/} Other documents show the BAT Group continuing to promote the "open question" despite recognition within the BAT Group that there was no such controversy. For example, in August 1980, BATCo. had entered the British tobacco market, and thus needed to coordinate its smoking and health policies with the greater BAT Group. To that end, Dr. L.C.F. Blackman wrote a memorandum urging "conciliation rather than confrontation," and suggesting that the company's credibility would suffer if it continued to argue that causation had not been proven without further explanation. Ex. 66. Dr. Blackman recognized that there was no merit to "semantic arguments such as . . . [i]t has not been proven that smoking is harmful to health [or a] statistical association does not amount to proof" (id. at 1), and recommended that the company undertake a "education process" in which consumers would be reassured that the industry was working "to reduce the statistically associated health risk of smoking to acceptable or even non-detectable levels."

In later published brochures, little change in the BAT Group policy appears to have been effectuated -- the emphasis remains on the existence of "a genuine controversy," but emphasizes more the "complexity" of all the scientific issues, as well as the considerable amount of money that has been spent on research. See Ex. 67-68. This proposed approach is consistent with that pursued by the American tobacco industry. See, e.g., App. ¶¶ 34, 43.

Dr. Blackman's emphasis of "the genuine controversy" and the "complexity of the issues" was reinforced by him during a March 1981 presentation in New Orleans to the BAT Group. Ex. 69. There, Blackman represented that "BAT's involvement in [smoking and health research] is only part of an industry-wide effort" Id.

An October 1980 note by Blackman states in anticipation of an upcoming CAC conference: "One cannot fail to notice in past papers and memos (mainly from R&D) there is frequent reference to 'causality is not proven' -- quickly followed by the qualification that 'scientific proof is not necessary'! Thus, our approach has been wholly defensive -- both internally and in the eyes of the world." Ex. 70 at 1.

CAC VI, a conference of BAT Group management held in May 1981, was a platform for Mr. Sheehy, shortly before becoming BAT's chairman, to present BAT's view of the future of the tobacco industry as well as the question of the industry's credibility. Ex. 71-72.

In May 1982, BATCo. issued "Smoking Issues: Scientific and Medical Attitude and Opinion." Ex. 73. Shortly before, an unknown author commented on a draft, stating that "[i]t is not really true, as the American Tobacco Industry would like to believe, that there is a raging worldwide controversy about the casual link between smoking and certain diseases." Ex. 74 at 1.

Another example of internal BAT Group consideration of an alternative approach on smoking and health are shown in a "proposition" prepared for an unknown author in anticipation of CAC VIII. Ex. 75.

corporate policy on the "open controversy," derived from the previously discussed 1984 "Legal Considerations on Smoking and Health Policy" document, was still being included in BAT's Group-wide "Statement of Business Conduct," and compliance was still mandatory at all BAT Group companies. The December 1993 Statement of Business Conduct, distributed by then BAT Chief Executive Officer M.F. Broughton to all subsidiaries, notes:

This Statement of Business Conduct applies to all directors, officers and employees of B.A.T Industries p.l.c. and its principles apply to all directors, officers and employees of every company with the B.A.T Industries group of companies. . . .

A list of existing policies and guidelines which pertain to this Statement appears at Appendix 1. . . .

Staff at all levels are accountable for acting in accordance with these principles to the full extent of their responsibility. . . .

It is expected that any exception to or breach of the principles encompassed by this Statement will usually be dealt with by immediate management disciplinary action (which may include dismissal in an appropriate case)

Ex. 76 at 1-3. The Statement of Business Conduct itself prescribed the position on smoking and health for all subsidiaries.

It is important that statements made concerning cigarette smoking and health related issues be factually and scientifically accurate. It is the considered view of the Group that (1) scientific causation between smoking and diseases allegedly related to smoking has not been established; and that (2) the Group should not make health claims for tobacco products in connection with product promotion.

Id. at 14.

Included in the Statement of Business Conduct's appendix of "existing policies and guidelines" is the same March 1984 document entitled "Legal Considerations on Smoking and

Health Policy" (Ex. 77) that BAT had sent to its worldwide subsidiaries nine years earlier. That document states that a "genuine scientific controversy" exists concerning the role of cigarettes in causing disease. BAT's intent that all subsidiaries adhere strictly to this policy is evident in its transmittal letter of the 1993 Statement of Business Conduct to its American subsidiary, B&W:

B.A.T Industries has for many years maintained policies and standards covering various aspects of business conduct and has required their adoption by all B.A.T Group companies. . . . The Statement and the Guidance Notes clearly reaffirm where the B.A.T Group stands on key issues. . . . You will, I am sure, wish your Operating Group to adopt the Statement as policy and to bring the contents of the Statement to the attention of employees within your Operating Group."

Ex. 78 at 1-2 (emphasis added).^{18/}

In sum, there is considerable evidence that BAT had significant involvement in developing and enforcing the "open controversy" among its subsidiaries, and that this conflicted directly with the widespread scientific consensus acknowledged by those subsidiaries and BAT.

D. BAT's Involvement in the Creation and Use of a Compendium to Emphasize "Anomalies" in Epidemiological Evidence of Smoking as a Cause of Cancer

The Complaint alleges that defendants have engaged in continual efforts to undermine mounting epidemiological evidence linking smoking to various diseases since the 1950s. See, e.g., Compl. ¶¶ 30-36. The United States alleges that defendants have often used industry-funded groups like the Council for Tobacco Research to promote research — including lawyer-controlled research demarcated as "Special Projects" — designed to undermine the scientific evidence demonstrating the health effects of smoking. See, e.g., Id. ¶¶ 56-69. Publicly available evidence documents BAT's active role in the development and dissemination of material to

^{18/} BAT appears to have used the term "Operating Group" to refer to regional groups of subsidiaries.

attack epidemiological evidence linking smoking to disease.

In November 1983, a work plan was submitted in order to develop a "Compendium of Epidemiological Studies" ("Compendium") for BAT. Ex. 79. The Compendium was put together at the request of the TSRT of BAT and was intended to be used in scientific and legal circles, as well as for distribution to the widest possible audience -- specifically including lawyers and scientists in the United States, as well as possibly to other tobacco companies. Ex. 80 at 1. The December 1984 notes from a meeting between the principal person responsible for the Compendium, BATCo.'s Dr. R.E. Thornton, and BAT Chairman Patrick Sheehy, explains the purpose of the Compendium: "It was reaffirmed that the aim of the compendium was to illustrate the range of material which supported the controversy on smoking issues." Ex. 80 (emphasis added).^{19/}

The Compendium challenged numerous aspects of existing epidemiological studies, and included studies that searched for factors other than smoking to explain elevated mortality rates of smokers. Ex. 79 at 1 (Terms of Reference). At the formal presentation of the Compendium to the TSRT of BAT, it was noted that the Compendium "contain[s] . . . abstracts of scientific papers demonstrating the anomalies and inconsistencies in the published work on epidemiology, relating to the alleged effects of smoking on health." Ex. 82 at 4. At that same meeting, BAT Chairman Sheehy directed that "each company should start to use" a summary of the Compendium that had been prepared "in appropriate circumstances and should consider the

^{19/} BAT's intent that the Compendium provide persuasive support for its "open controversy" position is evident from a letter a BAT employee sent to Dr. Thornton while Dr. Thornton was developing the Compendium. The letter suggested and outlined a "short book" that, like the Compendium, would attempt to justify BAT's "open controversy" stance. Ex. 81.

justification for translation into other languages." Id.^{20/} BAT also identified the target audience, instructing that a summary of the Compendium "should be made available for external discussions with politicians, regulatory bodies, scientists, etc." Id.^{21/}

BAT's Chairman, Patrick Sheehy, played a pivotal role in overseeing the development of, and commenting upon, the Compendium. Ex. 80 at 1; Ex. 84 at 1; Ex. 85-86; see also Ex. 65, 82, 87-96, 34-35, 97-104 (TSRT meeting minutes). Sheehy met personally with the Dr. Thornton, the Compendium's primary author. Ex. 80. Sheehy also authorized the transmittal of the Compendium to Professor Burch for his "informed opinion" about it, and indicated plans to visit Burch personally on the matter. Ex. 86. Subsequently, in December 1986, Sheehy circulated a paper by Burch to "All No. 1's of Tobacco Companies" and "Members of the B.A.T Industries' Board." Ex. 4. In his cover letter, Sheehy noted his own personal "continuing active involvement in [the] debate [regarding the dangers of smoking]." Id. Sheehy concludes stating his hope "that the Tobacco Companies may find ways of using it internally, in discussions with the authorities and in a more general public relations context in showing that although the alternative view may not be as attractive to the media, the extreme claims by our opponents can and should be challenged." Id.

^{20/} Also at that meeting, Professor Alvin Feinstein, a longtime recipient of tobacco industry grants for lawyer-controlled "Special Projects" in the United States (see supra n.9), made a presentation to the TSRT on the "limitations of epidemiology." Ex. 82 at 5.

^{21/} There is further documentary evidence that the Compendium was intended to be an instrument of advocacy, not simply an unbiased look at the epidemiological evidence available to the public. The documents show that BATCo. considered and rejected the idea of entrusting authorship of the Compendium to an outside party or organization because "there can be no guarantee that the outcome of the re-working and re-writing [by an outside author] would be acceptable to the company." Ex. 83 at 2.

Thus, the publicly available evidence indicates that the BAT Chairman played a central role on smoking and health issues (just as he had previously at BATCo.), and directed the development and strategic distribution of the Compendium.^{22/}

E. Implementing Group Wide Policy in Response to the United States' Legal Climate: BAT's Influence over the Conduct and Dissemination of Scientific Research

The publicly available evidence shows that BAT facilitated efforts to limit the type of research undertaken within the BAT Group and to limit the dissemination of potentially detrimental scientific evidence. In so doing, BAT exercised its prerogative as the BAT Group parent to indicate to its subsidiaries around the world the type of research that was permissible in light of its position on smoking and health issues.

The United States has alleged that defendants promoted an "open controversy" position that ran contrary to the great weight of scientific information known to them. See, e.g., Compl. ¶¶ 37-43. Documents show that BAT set an "open controversy" position for its subsidiaries that ran counter to the often-expressed consensus among scientists in the BAT Group on the health effects of smoking. Similarly, available documents show that BAT imposed research policies that halted research on the health effects of smoking and on the development of a less hazardous product, a course of conduct consistent with that alleged in the Complaint (Compl. ¶¶ 44-55) for all defendants.

1. Setting Research Priorities

^{22/} BAT's "interest" in epidemiology was also evident when, in 1985, the TSRT decided to establish a conference "on the limitations of epidemiology," with the TSRT and Sheehy actively monitoring work being done for the conference. Ex. 99 at 1.

In 1978, BAT Group scientists indicated that a less hazardous cigarette could be developed through research aimed at isolating and reducing harmful components of cigarette smoke. Ex. 8 at 1, 4. However, documents describe an event soon thereafter in which BAT was forced to confront the problem such research could have both for itself and for the other defendants. In 1979, just a few years before he became BAT's Chairman, Patrick Sheehy received a report from senior BATCo. scientist L.C.F. Blackman about Blackman's visit to B&W and BAT's Canadian tobacco subsidiary. Blackman reported B&W's recommendation for structuring BAT research to allow greater control over the flow of damaging information. B&W asked that a more centralized research program provide that:

Associates own "research" is effectively co-ordinated by BAT -- but without damaging the Associates own commercially oriented developments

We become more "politically sensitive" in the areas of smoking and health, e.g., reporting of "nasties" and biological studies generally. ("Remember what pays all our salaries.")

Ex. 105 at 1.^{23/}

The available evidence suggests that Sheehy responded to B&W's request as Chairman of BAT, assigning BATCo. the central responsibility for coordinating research and the communication of tobacco-related information. Ex. 28. BAT, however, retained ultimate authority on policies of critical import to defendants. In 1996, the public position on smoking

^{23/} This is but one example of the B&W perspective on such issues that was frequently communicated to BAT. That view was informed by the advice it had received from the leading tobacco industry law firm, that "the effect of testimony or documentary evidence that cigarettes cause cancer or other diseases, coming from a cigarette company's own people (or those of its parent corporation and research collaborator), would likely be fatal to the defense" in smoking and health litigation. Ex. 256; see also Ex. 106.

and health was announced from the top -- Chairman and Chief Executive Martin Broughton. He stated that "[w]e haven't concealed, we do not conceal and we will never conceal. We have no internal research which proves that smoking causes lung cancer or other diseases or, indeed, that smoking is addictive." App. ¶ 101.

In a 1986 document prepared for the TSRT, entitled "Tobacco Research in the B.A.T. Industries Group," BAT was again made aware that B&W was "opposed to any research which has any relevance to the smoking and health issue other than providing financial support if this is thought necessary to broadly based external research programmes e.g., genetic mechanisms of disease." Ex. 106 at 2.

This document explained that product research could constitute an implied admission regarding the safety of existing products. Id. The paper observed that B&W's position regarding product research was that there should be none because a "jury might conclude that we were researching because we felt that the present product was defective." Id. Furthermore, the report clearly communicated BAT's recognition that its fate on smoking and health issues was linked to other cigarette manufacturers. "Knowledge of one company will be attributed to others" in determining what the "state of the art" was on cigarette safety issues. Id.

While B&W urged BAT to set a research policy that best suited the American industry's litigation position, BATCo. and other BAT Group believed that they had a legal obligation to conduct research into the safety of their products. BAT was "asked for a ruling" on how to reconcile the differing priorities. Id. at 1. This request demonstrates the understanding of the subsidiary companies that BAT retained the authority to determine research policies and priorities for its tobacco companies.

The publicly available evidence does not reveal how BAT resolved this particular conflict. However, when BAT again faced a similar issue in October 1986 — whether to support research by a Canadian tobacco affiliate, Imasco Ltd. — the TSRT concluded "that it was not likely to be a rewarding line of investigation." Ex. 102 at 2. It was also noted that "if a competitor did succeed in achieving a break-through on classifying factors associated with the susceptibility of cancer, this information would be freely available to everyone." Id. This response appears to be a reference to what the United States has alleged was an industry-wide "gentleman's agreement" not to compete on "safer cigarette" and smoking and health issues. See Compl. ¶ 44-47.

BAT Chairman Sheehy elaborated on this response two months later. His December 1986 letter to Imasco reflects his clear intention to maintain the same public relations and litigation strategies as the other defendants. Ex. 255. His two-part message was: first, instead of working to make the current product safer, focus on making it more socially acceptable; and second, BAT cannot and would not support activity that might undermine the industry's position in smoking and health litigation.

I have reviewed the position [Imasco has taken on fundamental research] with my colleagues. Since there is such a wide discrepancy between your approach and that of the rest of the Group, I thought that I should write to explain why it is that I cannot support your contention that we should give a higher priority to projects aimed at developing a 'safe' cigarette (as perceived by those who claim our current product is 'unsafe') by either eliminating, or at least reducing to acceptable levels, all components claimed by our critics to be carcinogenic.

The BAT objective is and should be to make the whole subject of smoking acceptable to the authorities and to the public at large since this is the real challenge facing the Industry.

Id. at 1 (emphasis in original). Sheehy then discussed the "several approaches" BAT was pursuing to "contribute to the overall acceptability of smoking." These include "tak[ing] note of all relevant publications that can throw light on [the causation issue]"; sponsoring research on "mechanism of disease, including psychological or genetic predisposition"; "probing the simple conclusions of what is probably rather poor epidemiology"; "challeng[ing] the whole area of 'low risk epidemiology'" related to passive smoking; and "studying the so-called 'benefits of smoking.'" Id. at 2.

Absent was any mention of active research directly on the health effects of smoking or research on making less hazardous products. Sheehy justified his view that removing hazardous chemicals from cigarettes was not a worthwhile undertaking by explaining that "strong vocal factions" would continue to press for safer and safer products. Id. Sheehy added:

A second practical objection is that in attempting to develop a 'safe' cigarette you are, by implication in danger of being interpreted as accepting that the current product is 'unsafe' and this is not a position that I think we should take.

Id. at 2.

2. "Restructuring" Research

The evidence indicates that BAT's awareness of the potential risks of internal research on the health effects of smoking cigarettes led to a significant restructuring of the Group's approach to research in 1985 under the direction of TSRT. Claiming that 25 years of internal research had yielded "no clear answers" about the "biological activity" of smoking, the BAT Group relegated to outside entities research about "whether or not there is in fact any relationship between

smoking or smoke components and particular forms of ill health." Ex. 107 at 3.^{24/} The internal "arm" of research was intended "to anticipate and meet either: consumer demand, or requirements of regulatory authorities." The priorities of the internal arm were such projects as "Subjective Smoke Improvement," "Subjective Cigarette Physical Parameters," "Cost Reduction," and "Social Aspects." Id.^{25/}

For the external arm, the BAT Group Research Conference recommended that a "Scientific Advisory Group" of BAT Group "experts" be set up to keep track of external research, "to evaluate the quality of that research and any conclusions based upon it and, when in its view supplementary or clarifying work is required, to recommend the allocation of funds for that purpose." Id. at 6. The details for the proposed board would be cleared with BAT Group CEOs, before a "recommendation is made to" the TSRT, presumably for a final decision. The TSRT approved this program after detailed participation by the BAT Chairman. Ex. 100 at 2; Ex. 101 at 1; Ex. 102 at 1.

Publicly available documents show that BAT oversaw limited research into less hazardous products primarily to keep pace with other companies' efforts in this area. See, e.g., Ex. 108 at 2 (BAT Group "did small amounts of unconnected work in [the novel smoking concept] area, mainly because of rumors that RJR and others were seriously working in the

^{24/} In April 1992, the TSRT terminated support for the "broad-based long-term research programme" at BATCo.'s Fundamental Research Centre, and folded that entity into BATCo.'s Technology Centre. Ex. 28 at 27.

^{25/} The first listed objective for the "Smoking and Health Research Strategy" was "to determine the effects of smoking, if any, on the smoker" -- the most fundamental question about its product on which the BAT Group indicated it had made no progress in 25 years of research. Id.

area"). Indeed, BAT closely followed Reynolds' efforts on its Premier product, and recognized the possibility that such a product might be classified as a "drug delivery system" subject to FDA regulation. Ex. 109 (September 7, 1988 letter from B&W Chairman and CEO Pritchard to BAT Chairman Sheehy, providing detailed description of Premier's design and update on debate over whether Premier would fall under FDA jurisdiction); Ex. 87 at 3. Soon after Premier failed in the marketplace, BAT ordered the termination of efforts to develop and test-market less hazardous products. See, e.g., Ex. 87 at 2 (in 1988, TSRT pushed Project GREENDOT — to develop low tar, regular nicotine delivery cigarette — upon learning of Reynolds' imminent launch of Premier); Ex. 108 (Projects GREENDOT and AIRBUS abandoned after 1989 failure of Premier).

3. Avoiding Discovery of BAT Group Scientific Research

The BAT Group was presented with the issue of how to avoid such information from coming to light in the United States. The publicly available evidence establishes that BAT was aware of, and on occasion directly facilitated, B&W's and BATCo.'s efforts to conceal such information.

Among the evidence in the public record is a series of memoranda and file notes authored by B&W's corporate counsel, Mr. J. Kendrick Wells. One of the earliest memoranda on this subject is a 1979 memorandum marked "Restricted," from Wells to Ernest Pepples, the Vice-President and General Counsel of B&W, in which Wells discusses how scientific research generated by the BAT Group research facility in England should be shared with B&W:

The [scientific] material should come to you [Ernest Pepples -- General Counsel of B&W] under a policy statement between you and [BATCo's laboratory in] Southampton which describes the purpose of developing the

documents for B&W and sending them to you as use for defense of potential litigation. It is possible that a system can be devised which would exempt the Engineering reports [which Wells reports previously in the document almost never concern smoking and health issues] because it might be difficult to maintain a privilege for covering such reports under the potential litigation theory.

Continued Law Department control is essential for the best argument for privilege. At the same time, control should be exercised with flexibility to allow access of the R&D staff to the documents. The general policy should be clearly stated that access to the documents and storage of the documents is under control of the Law Department and access is granted only upon approval of request. A secured storage area of the documents should be arranged, perhaps in the R&D library [as opposed to the law library] and the policy statement would designate the same terms and conditions of storage for the documents as were spelled out for the literature retrieval service files The abstracts of the documents should be circulated only for the less sensitive categories and then only to a list given prior approval by the Law Department.

Ex. 110 at 1-2 (emphasis added).

In a subsequent memo, Wells suggested that an intermediary be utilized, but that similar

"privilege" procedures be employed:

I have discussed with Gil Esterle [International and External Technical Services Department] various alternatives for handling BAT scientific reports which come to B&W in a way that would afford some degree of protection against discovery. . . . One alternative discussed was that all BAT scientific reports would be sent to you.

The cost sharing agreement between B&W and BAT, under which B&W pays for BAT scientific research and receives reports, is an obstacle because as presently written it would probably contradict the position that you were acquiring the reports for purposes of litigation.

I recommend a second alternative, which would be that all BAT scientific reports be shipped directly to Dr. Esterle under a formal arrangement that Dr. Esterle was assigned to be your agent for the acquisition of scientific materials in anticipation of litigation. Dr. Esterle would separate the reports which were relevant to smoking and health, or otherwise sensitive, for special handling as described below and place the routine reports into regular R&D circulation.

Ex. 111 at 1. Wells also made clear the reasons why it was important to document a formal relationship with the BAT Group on these procedures:

There would still be the matter of the cost sharing agreement. Regardless of the initial recipient of the documents, in order to be covered by the rules of civil procedure they must be "prepared in anticipation of litigation." Appropriate paper work should be established with BAT, including any amendments to the cost sharing agreement to establish that documents of a certain nature are prepared for B&W in anticipation of litigation. I have in mind paper work which would make this statement as a policy between the parent and sibling, but that in the operational context BAT would send documents without attempting to distinguish which were and were not litigation documents.

Ex. 111 at 1-2 (emphasis added).

Finally, the public record contains evidence as recent as 1992 indicating that B&W was only allowed to participate in the exchange of Group R&D materials to the extent it was "able to do so consistent with the status of pending product liability litigation in the United States. . . ."

Ex. 112.²⁶

4. Removing BAT Group Scientific Research From B&W's Files

In January 1985, J. K. Wells wrote a memorandum in which he advocated that certain scientific documents should simply be declared "deadwood," removed from B&W files, and shipped off-shore back to "BAT" (not specifying in the memorandum whether he meant BATCo.

²⁶ B&W and BAT's concern about adverse evidence in the files of BAT Group companies was ongoing in the 1980's. For example, in April 1983, B&W prepared a report to the BAT Group's United States managers (some of whom were on the board of BAT). In this report, B&W observed that "intense hostility of the [United States legal and social] environment also places a high priority on control of statements by the manufacturers on the issues. An unfortunate statement could bring the house down." Ex. 113 at 17. The report also stated: "Products liability litigation may be the most obvious arena where a misstatement could cause difficulty. In some states in the U.S., no causation and voluntary informed consumption may be the only defenses a manufacturer can make against a health lawsuit." Id.; see also Ex. 114-115.

or BAT) in England.

I explained I had marked certain of the document references with an X. The X designated documents which I suggested were deadwood in the behavioral and biological studies area. I said that the "B" series are "Janus" series studies [mouse skin-painting studies demonstrating that tobacco tar is carcinogenic] and should also be considered as deadwood.

I said in the course of my review of scientific documents stored by RD&E, a great deal of deadwood had appeared, such as studies of the chemical composition of Canadian tobacco leaf in 1966. . . .

I suggested that Earl [Kohnhorst, and B&W employee] have the documents indicated on my list pulled, put into boxes and stored in the large basement storage area. I said that we would consider shipping the documents to BAT when we had completed segregating them. I suggested that Earl tell his people that this was part of an effort to remove deadwood from the files and that neither he nor anyone else in the department should make any notes, memos or lists.

Ex. 116 at 1-2 (emphasis added).^{27/}

For documents created after the apparent "deadwood" removal, BAT distributed a detailed set of directives for how information and materials were to be transmitted to the United States. Rather than employing prior considered methods involving the use of attorney-client privilege and work product claims for such material, the decision was made to remove B&W's name from the distribution list entirely from adverse documents, even though such documents were still to be circulated to B&W:

- (a) On receipt of the copy of the memo from Millbank [the BAT Group Research Centre]. . . three copies of the Report should be sent to the U.S.A.

^{27/} The document list upon which "deadwood" was designated is several inches thick. Excerpts of the document appear at Ex. 117. A review of the list shows that "deadwood" were any documents bearing the euphemism of "biological," i.e., "carcinogenic." See also Ex. 118 (discussions concerning sending documents "offshore").

- (b) 1.1(d) [a rule stating that the recipient list must not contain the name of any B&W person] applies.
- (c) They should be addressed to:
Robert L. Maddox, Jr.,
Wyatt, Torrent & Combs,
28th Floor, Citizens Plaza
Louisville, Kentucky, 40202.
- (d) The covering letter should simply say that BATCo. Millbank has called that he, Maddox, receive the documents. (No other statement is necessary).

Ex. 119 at 1.

In addition, in late January 1985, G.L. Dennis of BAT forwarded to BATUS (another United States subsidiary of BAT at the time) a procedure "just adopted" by BATCo. "for clearing scientific and other documents which are sent outside the Group." Ex. 120 at 1. Shortly thereafter, Henry F. Frigon, President of BATUS, assured Mr. Dennis that he "will review this procedure with BWT [B&W] and our staff here to ensure our procedures are in line with this policy." Ex. 121 at 1. Frigon then forwarded the procedure for handling documents to then-President of B&W, T.E. Sandefur, noting that it was "a very good idea for Tobacco to review their procedures and prepare a document such as the one provided by London." Ex. 122 at 1. Frigon informed Sandefur that he would send a copy of B&W's implementing document of the BAT directive to G.L. Dennis at BAT. Id.^{28/}

Shortly thereafter Earl Kohnhorst of B&W commented on BAT's new procedures for "Report Distribution":

^{28/} B&W implemented BAT's directive almost immediately, adopting a revised policy within two weeks. See Ex. 123 at 1. The documents subject to B&W's implementing policy included all documents "in any way relating to the smoking and health controversy, either from a scientific or public affairs perspective" and required Law Department approval. Id.

The procedure for receiving external reports from the Research Center has been changed. In the future, two copies of each report will come directly to me. One copy will be forwarded to you for your prompt review. You should pay particular attention to any sensitive issues and, in those cases where you have concern, you should review with Mr. Kendrick Wells prior to submission to the library system. In addition, please call my attention to any reports you feel should not be held in the library.

Ex. 124 (emphasis added).

Finally, there is evidence in the public record that, as late as 1986, efforts were undertaken to prevent BAT Group research from ever being disseminated in the United States by stopping such documents at the source -- the BAT Group's research facility:

[W]e should approach these projects on the basis of whether the reports are limited to the information from good science and whether the information is useful in the United States market. Our market is a "tar" and nicotine market, and information pertaining to other constituent delivery levels and biological effects will not be helpful.

B&W will receive concise reports, estimated to be about one-half page in length, twice each year for each project it wishes to follow. While the brevity of the reports will reduce the potential for receipt by B&W of information useful to a plaintiff, disadvantageous information could be included and the reports could serve as road maps for a plaintiff's lawyer.

I have advised that we can receive reports from some of these projects notwithstanding the risk. The reason is that we cannot shut out the flow of information: the BAT will find ways to get information into B&W from the scientific projects it is running in its laboratories worldwide. The only way BAT can avoid having information useful to plaintiff found at B&W is to obtain good legal counsel and cease producing information in Canada, Germany, Brazil and other places that is helpful to plaintiffs.

Ex. 125 at 1 (Memo of J.K. Wells). This selection of what would and would not be sent to the United States was to be discussed with other BAT Group companies: "I recommend you discuss the problems involved in the projects with counsel for the BAT companies involved." Id. at 2. There is evidence that these meetings took place. On February 25, 1986, BATCo. lawyers Anne

Johnson and Nick Cannar met with B&W's Ray Pritchard (who was also a member of BAT's Board) and Ernest Pepples. Ex. 126. Johnson and Cannar apparently were told that because of United States product liability concerns:

Research into product modification e.g. Biological activity, CO [carbon monoxide], etc. should not be done because:

- (a) there is no immediate or real commercial need (tar and nicotine being the only relevant/required indices); and
- (b) discovery of such research could prejudice B&W's chances of defending litigation.

Id. Johnson later became a "senior solicitor" at BAT. Ex. 199.

In sum, the publicly available evidence indicates awareness and concern of BAT and the BAT Group that the Group had in its possession research that would compromise defendants' position in products liability litigation. The evidence further shows that BAT collaborated with its subsidiaries to address the threat, both through its control of the Group's research facilities and its enforcement of "circulation" policies vis a vis the United States for the rest of the BAT Group.

III. BAT'S INFRASTRUCTURE MAINTAINED AN "APPROVED FRAMEWORK" FOR BAT GROUP OPERATIONS

This Proffer provides representative examples of the actual conduct of BAT that bears upon the allegations of conspiratorial and unlawful conduct alleged by the United States. There is substantial publicly available evidence describing BAT's corporate lineage, as well as the numerous institutions, structures, forums, committees, and individuals through which BAT conducted its corporate activities. A presentation of some that evidence follows.

A. The 1976 "Scheme of Arrangement"

In May 1976, through what is known under the laws of the United Kingdom as a "Scheme

of Arrangement," B.A.T Industries Ltd. (later named B.A.T Industries p.l.c.) assumed control of the BAT Group in order to create an ultimate parent company to enhance the marketability of BAT stock, as well as to "facilitate the development of the divisional organization begun by BAT[Co] in 1973." Ex. 2 at 1; see also Ex. 127-129.^{29/} Through this arrangement, BAT became the controlling parent corporation for the BAT Group corporate enterprise – including its extensive tobacco operations around the world. At the time of the corporate restructuring, the BAT Group had grown to become the third largest United Kingdom-based industrial enterprise, although the greater part of its operations were overseas. Ex. 131 at 3. The BAT Group also proclaimed it had "a prominent part in research associated with the problems of smoking and health." Ex. 127 at 16.

B. BAT's Corporate Continuity

The evidence indicates that after the reorganization, BAT assumed the role BATCo. had previously occupied -- the central coordinator and ultimate authority on smoking and health policy, marketing, and scientific research. Indeed, many of the same individuals who had directed BATCo.'s efforts in these areas became BAT officers, directors, and employees. For example, the announcement of the Scheme of Arrangement explicitly provided that Mr. Peter Macadam, the Chair of pre-1976 BATCo., was to succeed to the Chairmanship of BAT. That same announcement provides that the post-merger BAT Board "will be constituted so that it would 'be composed entirely of the present directors of BAT[Co].'" Ex. 2 at 3. In other words,

^{29/} The mechanics of the Scheme of Arrangement involved the merger of British-American Tobacco Company Limited into the Tobacco Securities Trust Company Limited ("TST"). TST was subsequently renamed B.A.T Industries Limited, which then was renamed B.A.T Industries p.l.c. Ex. 130.

the entire directorship of BATCo. became the directorship of BAT.³⁰

BAT adopted and continued to enforce policies relating to smoking and health previously set by BATCo. To reiterate its authoritative role, BAT formally established the "approvals required [and] . . . laid down so that the ultimate authority for matters of the greatest importance is reserved to the Main Board." Ex. 135 at 1.

For instance, in a document entitled "Delegated Authority," the BAT board acknowledged a "high degree of divisional autonomy" within each operational group, but only so long as such autonomy is "exercised within the frameworks approved by the Board." *Id.* BAT reserved for itself complete responsibility for objectives and strategies, as well as significant research and development expenditures. *Id.* Similarly, the BAT board kept for its own decision-making the "overall [a]llocation of resources," the "[d]etermination of business parameters for each [d]ivision," the establishment of financial forecasts, and the establishment of "[d]ivisional [a]nnual [b]udgets." *Id.* This September 1976 BAT document, except for different threshold budgetary amounts, is identical to an October 1974 BATCo. document with the same title. *See* Ex. 136; *see also* Ex. 137 (BAT's 1994 version of same document).

C. Establishing a Uniform Set of Policies

The available evidence indicates that BAT utilized an extensive infrastructure to coordinate and control activities of its subsidiaries. Ex. 138. For instance, BAT charged

³⁰ A BAT filing with the United States' Securities and Exchange Commission ("SEC") similarly evidences the continuity. As BATCo. had listed on the stock exchange prior to the 1934 Securities Exchange Act, it was exempt from various filing requirements imposed upon most large conglomerates. Immediately after the merger, BAT applied for and received a ruling from the SEC declaring that BAT was a substantial continuation of the pre-1976 BATCo., and therefore BAT was entitled to grandfathered "unlisted trading" status that its predecessor had enjoyed. Ex. 129, 132-134.

BATCo. with "developing, agreeing and coordinating the key strategies for its tobacco activities." Ex. 28 at 25; see also Ex. 139. These instructions follow from BAT's instructions as to the interrelationship between BATCo. and B&W (sometimes through BATUS):

The Managing Director [of BATCo.] will also ensure that B.A.T Co's strategies for tobacco activities are communicated via his Chairman to BATUS, particularly in areas of common concern such as Smoking Issues, international leaf sales, international cigarette marketing and management development. The Managing Director will resolve with his Chairman [who is also a BAT Deputy Chairman] conflicts of interest if and when they arise.

The Managing Director will ensure that adequate liaison takes place between the Functional Directors of B.A.T Co. and those within the Tobacco Operations of T [Brown and Williamson Tobacco], e.g., Marketing and R&D Strategies of T and BWIT. Where these Strategies are in conflict or are likely to damage B.A.T Co's own tobacco interests in some way, the Managing Director will advise his own Chairman.

Ex. 140 at 3.^{31/}

^{31/} Many of these policies had their origin with one or another subsidiary, including defendants BATCo. and B&W. However, to the extent that these became worldwide policies for the entire BAT Group, this could have only been accomplished by the overarching parent corporation, as BATCo., for example, had no authority, official or otherwise, over B&W. Documents demonstrate that BAT ordered BATCo. to conduct and organize BAT Group research and development. See, e.g., Ex. 141. Additionally, this "comprehensive, co-ordinated BAT Industries/BATCo. R&D programme" was to be agreed with the constituent CAC companies, and then forwarded to the TSRT. Id. at 1. This was due to the recognition by the TSRT, headed by BAT's chairman, that the resources of the entire BAT Group was necessary for a thorough research program. See, e.g., Ex. 106 at 3 ("Furthermore, although B&W cannot match other US competitors in research, the full BAT Group resources should and probably can. It could be argued that B&W need the rest of the CAC laboratories to complement their own effort by undertaking work in other areas including smoking and health").

Moreover, BAT was the ultimate head of BAT Group research and development. See Ex. 142 at 1 (BAT Research organizational chart listing BAT at the top, with BATCo, B&W, BATCF, Souza Cruz, and Imasco as subsidiaries); see also Ex. 106 (B&W and BATCo. appeal to BAT to resolve a conflict in research priorities). BAT established that research coordination was to occur via the TSRT to "formulate overall strategic objectives"; via the Research Policy Group to "[d]evelop group research plans to meet strategic objectives"; and the Scientific Research Group to "set group policies and issues related to additives, pesticide residues, and

Sometimes, this cooperation occurred. For instance, in 1986 A.L. Heard of BATCo. reported to E.A.A. Bruell, then on the Board of BAT, that B&W and BATCo. were jointly seeking to recruit scientist/consultants from another company, Advanced Tobacco Products, Inc. Ex. 143 at 2 (note to Bruell re: Position Paper of Tobacco Strategy Group).^{32/}

The BAT compliance manual, "Statement of Business Conduct," promulgated in 1993 and applicable to all BAT subsidiaries, demonstrates the extent of BAT's reach and monitoring of its companies.^{33/} As noted supra at Sec.II.C.4., its directives "applie[d] to all directors, officers, and employees of B.A.T Industries p.l.c. and its principles apply to all directors, officers and employees of every company within the B.A.T Industries Group of companies." Ex. 76 at 1.

The document spelled out that:

smoking and health." Ex. 142 at 2; See also Ex. 144 (BAT "Group Tobacco Functional Programmes 1994"); Ex. 145 at 2 (Instructions to BATCo., July 1987: BATCo. charged with coordinating R&D, then presenting its plan to the TSRT prior to implementation).

_____A document marked "Restricted" and entitled "Evaluation of External Research Contracts," identified various types of research contracts, and responsibilities for administering them within the BAT organization. The first was identified as "1.1 Work necessary to fulfill specific BAT Industry/BATCo. action plans for company-based initiatives, mainly in the Smoking and Health Area. . . . There are relatively few contracts in this area and a procedure is established: decisions are made at the Chairman of BAT Industries CAC conferences etc." (MRP001 6673-6677).

^{32/} The minutes of a February 9, 1995 meeting of the Tobacco Strategy Group reveals the import of such agreement. Describing Project Battalion, an internal corporate reorganization project, the draft meeting minutes indicate that "[i]t was thought that some impetus had been lost in R&D co-ordination." In the margins lies a correction of an unspecified reader: "Misunderstanding. Remove from minutes." Ex. 147 at 6.

^{33/} This document, discussed supra Sec. II.C.4., incorporated by reference a number of policies, including the March 1984 "Legal Considerations on Smoking & Health Policy" which instructed BAT subsidiaries that "the Group's position is that causation has not been proved and that we do not ourselves make health claims for tobacco products," because such claims "may in the future result in the attribution to the Group's tobacco companies of statements made or decisions taken by BAT Industries subsidiaries." Ex. 61.

It is expected that any exception to or breach of the principles encompassed by this Statement will usually be dealt with by immediate management disciplinary action (which may include dismissal in an appropriate case)

* * *

The Group Internal Auditor and The Solicitor shall make a report annually to the B.A.T Industries Audit Committee concerning (i) general compliance with this Statement throughout the Group and (ii) specific circumstances of violation which they may consider to be of interest to that Committee.

Ex. 76 at 3; see also Ex. 78 (transmitting Statement of Business Conduct to B&W)).

D. The Infrastructure: BAT Committees

Publicly available documents describe how BAT maintained a series of committees and boards to effectuate its policies. In some cases, BAT assumed control of committees that had been formed when BATCo. was parent to all BAT Group companies. In other cases, BAT created new structures. After 1976 this entire infrastructure of internal groups was under the direction and control of BAT, not BATCo., and served to unite BAT with its subsidiaries.

1. Chairman's Policy Committee/Chairman's Executive Committee

The Chairman's Policy Committee ("CPC") was established by the BATCo. Board in the mid-1970s to serve as "the key executive body of the Board." Ex. 148 at 2.^{34/} The CPC was comprised of several BAT Board members, and led by the Chairman of BAT, who was "responsible for ensuring the strategic coordination of the Group's tobacco interests in addition to his responsibilities as Chairman [of BAT]." Ex. 148 at 2. The Chairman of BAT appointed the members of the committee, "which is responsible for the day to day management of the

^{34/} Along with control of the rest of the BAT Group, the CPC was effectively transferred to BAT in 1976. BATES 500005678 (General Information Circular dated 23rd July 1976). Organizational charts also reflect that the CPC was located directly below the BAT Board of Directors. Ex. 150.

Group." Ex. 149 at 1; see also Ex. 151 (reorganization of BATCo. and the Group Research & Development Centre); Ex. 152 (notes in CPC report re: facilities update).^{35/}

BAT charged the Committee with a number of responsibilities, including determining the business parameters for each division, certain investment and disinvestment proposals and capital expenditures, and senior management and board appointments. Ex. 135. Other decisions, such as research and development expenditures above £500,000 and capital expenditures more than £10 million, were brought by the CPC to the full BAT Board for "ratification." Id.

Documents describing the CPC/CEC indicate that it had significant oversight of the BAT Group subsidiaries. BAT Group subsidiaries, including B&W, reported directly to BAT, and the CPC acted as the key executive body of the Board. The Operating Groups were subject to the directives of the CPC for policies on pricing, smoking and health issues, and other strategic priorities. Ex. 148 at 2; see also Ex. 153 (July 1992 letter from Patrick Sheehy to R.J. Pritchard relaying BAT's Guidelines for inclusion in B&W's 1993-1997 plans: "In the main, the guidelines restate the objectives and priorities agreed previously with the CPC"); see also Ex. 145, 154-183 (BAT guidelines setting strategies, objectives, and priorities for the BAT Group, including B&W and BATCo.). For instance, the Committee met in January 1994 to discuss B&W's four year plan. Ex. 185. After discussing various topics such as youth marketing, research expenditures, and the viability of specific brands, Chairman Broughton indicated that a complete realignment of the B&W plan was necessary: "The Plan as a whole is not acceptable. . . . The corporate objective is no longer appropriate for the whole of B&W and will be revised." Ex. 185 at 6.

^{35/} In February 1993, BAT Chairman Sheehy announced that as of April 1, 1993, Martin Broughton was to become the Chief Executive and Deputy Chairman of BAT, and the CPC was renamed the Chief Executive's Committee ("CEC"). Ex. 149 at 2.

BAT used of the CEC to centralize the BAT Group in Project Battalion, an internal reorganization project begun in the mid-1990s that was championed by Ulrich Herter, who was a member of the BAT Board, the CEC, and the TSG. In 1995, he explained the Project and espoused BAT's viewpoint and strategy for tobacco: "Battalion follows on logically from the move to end market control and it is about nothing less than the requirement to change the structure of our organization so that tobacco can be managed as one worldwide business." Ex. 186.

Herter discussed the clear limits of subsidiary authority under this new approach: "The new structure will . . . provide for clear strategic direction and will also incorporate very clear decision processes for those issues which cannot, or should not, be left to end markets." Id. at 2.³⁶ At bottom, Project Battalion was necessary "so that tobacco can be managed as one worldwide business." Id. at 1. For instance, Herter quickly resolved

an endless debate about which of our brands actually qualified as international. Our criteria for the selection of international brands are that they should be seen by the consumer as international and that they should have critical mass. On this basis, our international brands are: Lucky Strike, Kent, Pall Mall, Viceroy, State Express 555, Benson & Hedges, John Player Gold Leaf, Barclay and Hollywood. Carlton and Silk Cut are two new possibilities available to us since we made the deal with American Brands. End of debate!

³⁶ The August 1995 issue of the Battalion Bulletin (Ex. 187) resolves that the project will "centralise only that which is absolutely necessary" and will "take decisions as close to the market as possible," but listed numerous Group objectives that emphasize centralization: "establish a single integrated tobacco company"; "establish a consistent strategic direction"; "establish clear accountability at all levels"; "ensure [that] we have responsive and speedy decision processes"; and "establish common frameworks, methodologies and standards in every function." Id. at 2.

Id. at 4; see also Ex. 188-190.^{37/}

2. The Tobacco Division Board

The Tobacco Division Board was originally formed by BATCo. before the 1976 Scheme of Arrangement, and became an arm of BAT when it assumed ownership of the BAT Group.^{38/}

The Board was established to give prior consideration to various issues, such as smoking & health, research policy, and marketing policy, before referring them on to the main BAT board.

Ex. 191 at 1. Under the Chairmanship of Patrick Sheehy, the TDB changed the title "Smoking and Health" to the more neutral-sounding "Smoking Issues." Ex. 195 at 2.^{39/} Board members reported on their tours of the various BAT Group facilities, coordinated research efforts

^{37/} The text of Mr. Herter's speech to the BATCo. conference was forwarded by the BAT Board to Nick Brookes, then CEO of B&W, for distribution to B&W's upper management. Ex. 192. The cover letter to B&W stresses that "[t]here needs to be considerable focus on these imperatives in order to ensure a greater appreciation and knowledge of our strategy to correct the findings which arose from the Diagnostic Phase." Ex. 192 (emphasis added).

^{38/} For instance, a report from a 1974 BAT Group conference on smoking and health mentions that the TDB was to decide what documents should be distributed to "No. 1s of all group companies." Ex. 193 at 13. Additionally, at a meeting of the Research Policy Committee held in January 1975, BATCo.'s Dr. S.J. Green described "the way in which the Group Research concept had evolved over the years, originating from a response to the Smoking and Health problem and culminating in the current position, in which short-term work is mainly the responsibility of the operating companies, while the longer-ranged work is largely carried out at the centre and is co-ordinated on an annual basis." Ex. 194 at 3. The Research Policy Committee noted that its task was to provide the Tobacco Division Board with guidance on these long-range, group-wide "research and development objectives." Id. at 2. As discussed supra Sec. III.E.2., such "fundamental" smoking and health research was later moved to non-BAT Group contractors.

^{39/} A September 1979 letter from B&W International Tobacco describes the purpose and basic structure of the TDB, and noted the central role of Sheehy and the committees to the overall coordination of the BAT Group: "Whichever way you cut it, Mr. Sheehy is our boss: in our commercial role, he is the Territorial Director and for our Group role, he is the Chairman of the Tobacco Division" Ex. 200 at 6.

throughout the group, and paid particular attention to such issues as smoking and health concerns, as well as marketing/public relations policies. Ex. 196 at 3-5; Ex. 195. The TDB also served to "clear" position papers prior to distribution to delegates of the Chairman's Advisory Conference ("CAC").^{40/} Ex. 197 at 3 (mentioning recent TDB paper entitled "Smoking and Health Assumptions, Strategies and Constraints"); Ex. 198 at 8 (discussing TDB paper which outlined marketing tactics, including "utilisation of 'pressure groups,' whom tobacco manufacturers could influence, to bring favourable opinion to bear upon the industry").

A 1977 document entitled "Smoking & Health Item 7: The Effect on Marketing" is illustrative of the TDB's role in developing BAT's longterm marketing strategies. The author explains a plan promulgated at a recent CAC meeting that set out marketing plans for the upcoming decade:

The new approach to marketing, supported by suitable strategies, offers distinct opportunities to create brands and products which reassure consumers, by answering to their needs. Overall marketing policy will be such that we maintain faith and confidence in the smoking habit, whether brand choice is traditional or not in particular markets. This means that B.A.T. will not remain on the defensive, by simply reacting to alleged 'health' hazards and related competitive challenges: instead, we shall actively seek out all worthwhile prospects for brand and product reassurance in marketing throughout the world.

Ex. 198 at 1. Among other topics, the paper urges that, in order to respond to the "purely statistical evidence" of smoking and disease, BAT Group researchers should study the benefits of smoking, in which "a direct cause-and-effect relationship can be demonstrated." Id. at 7. The suggestion summarizes the suggested "hypotheses" for exploration:

Starting to smoke

^{40/} For a further description of CAC activities, see infra Sec. IV.D.4.

- adult status
- rebellion against authority (nb: a benefit for the smoker, if not for the authority)
- modernity
- economic status
- female emancipation

Continuing to smoke

- relieves stress
- reduced aggression
- relaxes
- aids concentration
- gives social confidence
- projects self-image
- relieves boredom: acts as a stimulus
- relieves loneliness: acts as a comforter.

Id. at 7-8.

3. The Tobacco Strategy Review Team / Tobacco Strategy Group

Although each BAT Operating Group reported directly to BAT, the parent corporation set up another committee, the Tobacco Strategy Review Team ("TSRT"), to address strategic issues affecting multiple operating groups. Ex. 201 at 1. BAT formed the TSRT "as a focus for co-ordination and for monitoring the implementation of specific strategies" such as research and development and "[t]he co-ordination of work on Smoking Issues and of discussions with regulatory authorities." Ex. 202 at 8.

TSRT membership was originally "limited to the CPC and the Main Board Directors responsible for liaison with each of the Operating Groups." Ex. 201 at 1. As with the CPC and TDB, the Chairman of BAT was the head of the TSRT. In 1988, at the direction of BAT, the CPC extended membership in the TSRT "to include the person primarily responsible for the Tobacco operations in each of the Operating Groups." Id.; Ex. 203. The Chair position remained

under the control of BAT.

The principal aims of the TSRT are particularly relevant to the allegations in the Complaint. A core purpose of the TSRT was to "mount[] a coherent strategic thrust in Tobacco."

Ex. 34 at 1. The TSRT's original "Terms of Reference" illustrates its mission statement:

The principal aims of the Team will be to ensure that the Group mounts a coherent strategic thrust in Tobacco, that there is effective technical and marketing co-operation between the Group's Tobacco businesses and that there is a unified approach on Smoking Issues.

Ex. 204 at Appendix 1. The TSRT was tasked to "[r]eview the approach being taken to Smoking Issues and consider what action needs to be taken to strengthen this approach or to resolve any inconsistencies." Id.^{41/}

In 1994, the Terms of Reference for the TSRT were reviewed in order "to optimise the Group's position" in light of changing international cigarette market conditions. Here, in even more explicit relief, the Terms of Reference spell out the task of the now-named Tobacco Strategy Group: the Group was to "agree," or make consistent, the positions, strategies, and policies of the various Operating Groups under the BAT umbrella. The proposed new terms

^{41/} The role of the TSRT — which was renamed the "Tobacco Strategy Group" in mid-1992, Ex. 205 at 15 — as a forum for exchanging important information among BAT Group companies, was further explained in a document detailing training programs entitled "B.A.T. Industries p.l.c. Group Tobacco Functional Programmes 1994." The introduction states that

[t]he Tobacco Strategy Group is the driving force behind this initiative to remodel the corporate programmes provided for managers in the tobacco companies. The objectives are to provide training that has relevance to the practical needs of managers and to base that training in the Operating Groups to more effectively share the knowledge of the Group's functional experts."

Ex. 206 at 2.

include:

- (i) To agree the strategy, objectives, policies and priorities for the Tobacco business, and to review its performance;
- (ii) To agree the marketing strategies for the International, Regional and major Domestic brands as proposed by their brand owners;
- (iii) To agree which management team has the responsibility for each market under the principle of end market control;
- (iv) To receive appropriate management information to be able to manage the Tobacco business by end market;^[42/]
- (v) To agree marketing strategies for the resulting regions or zones of influence as proposed by the responsible management team;
- (vi) To agree the priorities for new business development;

All the above areas will be reviewed periodically.

- (vii) To co-ordinate Group-wide long-term production capacity planning;
- (viii) To co-ordinate Group-wide product quality initiatives;
- (ix) To co-ordinate the use of Group-wide R&D and Technical resources, and agree priorities;
- (x) To co-ordinate the Group strategy on Leaf;
- (xi) To co-ordinate the Group's approach to purchasing;
- (xii) To ensure that a sufficient cadre of international managers is recruited, trained and developed;
- (xiii) To co-ordinate the Group's unified approach on smoking issues;
- (xiv) To ensure that optimum protection is given to the Group's trademarks;
- (xv) To ensure that "best practice" in all operational areas is communicated and adopted across the Group;
- (xvi) To resolve any conflict that arise between Operating Groups which cannot be resolved bilaterally.^{43/}

^{42/} There is partially legible marginalia, of unknown authorship, on this line of the document.

^{43/} As discussed supra, BATCo. and B&W appealed to the TSRT to resolve conflicting views concerning the appropriate scope of research. Ex. 106 (BAT was "asked for a ruling" on differing research priorities). See also Ex. 207; Ex. 208 (describing BATCo. appeal to TSRT to resolve conflict with B&W over data collection and reporting standards: BATCo. "tried hard to secure agreement with B&W and have moved substantially to adopt many of their suggestions, but their lack of flexibility has prevented me from eliminating all the differences . . . [o]f course, I must leave it to you to decide" (emphasis added); Ex. 139.

Ex. 204, at 1-2 (emphasis added).

There is substantial evidence of the TSRT's active involvement on many of these issues. TSRT enforced and monitored the operating companies' compliance with BAT guidelines and policies. See supra Sec. III.C.3. In addition, the TSRT was heavily involved in specific scientific research and development projects, product development issues, and marketing and advertising schemes. The TSRT authorized and oversaw BAT's creation of the Compendium of Epidemiological Studies. See supra Sec. II.D.; Ex. 80, 83-86, 99-100, 217-223. Other evidence in the public record indicates that TSRT was involved in research concerning passive smoking and safer cigarette technology. Ex. 100 at 1-2, 4; Ex. 101 at 1-2; Ex. 102 at 2-3.

Notes from several TSRT meetings record the TSRT's role in monitoring and encouraging research and development of a variety of innovations, including products using Y-1 tobacco, a strain of tobacco bred to have elevated nicotine levels. Ex. 34-35, 65, 82, 87-104, 210-215. From at least 1989 to 1991, the TSRT, and Chairman Sheehy in particular, pushed BAT Group companies to place orders for Y-1 and to focus on how to incorporate it into new or existing products. Ex. 65, 90.

BAT Chairman Sheehy and TSRT similarly emphasized the importance of utilizing chemical technologies, such as ammonia processing, intended to "optimize" the amount of nicotine delivered to a smoker. In the late 1980s and early 1990s, the TSRT directed B&W to organize technical seminars and to produce a "blender's handbook" to promote ammonia processing, and requested frequent updates on the progress of these efforts. Ex. 88, 224-226. The TSRT was also involved in marketing decisions concerning KOOL, Barclay and Capri cigarettes. Ex. 34-35, 65, 82, 87-104.

The publicly available minutes of TSRT meetings further describe the variety of ways that the TSRT was closely involved in events and issues pertinent to allegations in the

Complaint:

- The TSRT was involved in group-wide tobacco strategies; cooperative R&D efforts between Group members; and development of a unified approach on smoking issues. Ex. 87 at 1; Ex. 97 at ¶ 1(xii), ¶ 2(ix) & appendix. At one such meeting, the BAT Chairman "emphasized the importance of maintaining pressure on Smoking Issues" and suggested that "while maintaining pressure at the national level, particular emphasis should be given to organizing representations at municipal level, using local people as much as possible." Ex. 87 at 1.
- The TSRT reviewed marketing strategies of BAT group companies in order to formulate strategies to compete with Marlboro and Camel. Ex. 99 at 2; Ex. 100 at 2; Ex. 227 at 3-4; Ex. 96, 228.
- The TSRT was involved in cigarette design issues, including development of a new Barclay filter. Ex. 98 at 1; Ex. 99 at 1; Ex. 229.
- The TSRT sponsored research and conferences on smoking and health, at least in part to ensure that BAT Group companies spoke with one voice on smoking and health issues. Ex. 99 at 1; Ex. 88, ¶¶ 20(a) and (b), 21.
- When it appeared that Reynolds' Premier would be launched, the TSRT pushed secret projects like Project GREENDOT and Project AIRBUS to develop a "safer cigarette." After Premier was pulled from the market, the TSRT likewise pulled these projects from development. Ex. 87 at 2-3; Ex. 82 at 2; Ex. 88, ¶ 11; Ex. 230.

The TSRT appears to have instituted extraordinary procedures to ensure that deliberations and decisions of the TSRT remained confidential. See Ex. 231. These procedures included stamping all documents "SECRET" and distributing them only by hand or via a "secure fax machine" at which the recipient's secretary would physically be standing to receive the documents with instructions to call Windsor House "immediately after transmission" to confirm receipt. Id.

4. Chairman's Advisory Conferences

Continuing the policies of BATCo. when it led the BAT Group, BAT held a series of conferences to discuss smoking and health issues. Ex. 27, 55, 71-72, 75, 232-238. The Chairman of BAT set the agenda for the meetings, which covered a host of issues including smoking and health, marketing, and research and development.

In a CAC conference note from the 1982 Conference VII on Hayman Island, the Chairman noted that "the Smoking and Health issue must be a top priority." Ex. 239 at 1-2. Among other things, the CAC praised the improved "co-operation in R&D between C.A.C. Companies," and tasked BATUS with investigating and advising the other companies of the latest research on smoker "compensation." The first item on the Smoking Issues agenda was titled "The credibility of the industry." On this issue, the CAC members agreed on a number of "positive steps" to refute the growing attacks by anti-smoking advocates, including "[c]ontinuing the industry stance that Smoking and Health is still a debatable issue"; establishing "an effective intelligence and surveillance system" to detect supposedly "blatantly incorrect statements"; and refuting such statements, "wherever possible by independent people or bodies such as doctors and scientists." Ex. 239 at 4.

Conference X, held in London in 1987, involved similar themes. CAC members considered cigarette design developments and other research issues, the Group's position on the faults of epidemiology, and means of undermining adverse publicity, possibly by "generating 'headlines' similar to those which are coloring the public perception of the results of the work whose validity we are challenging." Ex. 240 at 15-16.

E. Interlocking and Successive Directorates

In addition to establishing its various committees for oversight and compliance of its subsidiaries, BAT maintained its influence over its operating groups by populating BAT Group subsidiaries with BAT employees and officers. The TSRT played a significant role in fostering this cross-fertilization of company management.

A 1979 document created by BAT explains the organizational structure of BATCo. Ex. 140. That document reveals that the BATCo.'s Chairman is also a Deputy Chairman for BAT, and that the Managing Director of BATCo. also sits on the BAT Board. Id. at 1. Even the BATCo. Executive Committee is "immediately below those of the B.A.T Company Chairman [i.e., the Deputy Chairman of BAT] and the B.A.T Industry Chairman's Policy Committee." Id. Both the "overall strategies applicable to the industrial activities," as well as "the processes necessary to examine these" are determined by the Managing Director and the Chairman, all "[w]ithin the guidelines determined by the B.A.T Industries Board." Id.

A review of BAT's Annual Report in 1988 reflects that there were many examples of overlapping officers and directors. For example, Sir Patrick Sheehy was Chairman of both BAT Industries and BATUS. According to Annual Reports for the following years, Sheehy was chairman of several BAT Group Boards. Ex. 241 at 4563. Sheehy was "responsible for ensuring the strategic coordination of the Group's tobacco interests in addition to his responsibilities as Chairman [of BAT]." Ex. 148 at 2. A biography of Sheehy described the evolution of his career with these companies:

He joined British-American Tobacco Company (BATCo) in 1950. . . .
[I]n 1967 he was appointed General Manager of the BATCo company in Holland. . . . In 1970 Sir Patrick became a member of the Group Board. In 1975 he became a member of the Chairman's Policy Committee and also Chairman of the Tobacco Division Board with special responsibility

for the extensive diversified interests in North America. . . . In June 1976 B.A.T. Industries was formed as the holding company for the Group and later that year Sir Patrick was appointed Deputy Chairman of B.A.T Industries. BATCo took over responsibility for the tobacco division with Sir Patrick as Chairman of the BATCo Board. Sir Patrick became Vice Chairman of B.A.T Industries in June 1981 assuming the prime responsibilities for formulating the Group strategies, which have been implemented since he became Chairman in October 1982.

Ex. 242; See also Ex. 243 at 6 ("Whichever way you cut it, Mr. Sheehy is our boss.").

Like Sheehy, other individuals served on multiple boards of BAT Group companies or moved between BAT and its subsidiaries. For example:

- B.D. Bramley was appointed to the BAT Board of Directors on April 1, 1988. (Ex. 241. At the same time, Bramley was to become Chairman of BATCo. Id.; see also Ex. 245: BAT announcement of "Main Board Appointments").
- H.F. Frigon was appointed to the Board of Directors of BAT effective April 1, 1988. Ex. 246 at 4563 (1987 BAT Annual Report). Mr. Frigon, a U.S. citizen, was to "continue as president and Chief Executive Officer of BATUS Inc." Id. This information was confirmed by an announcement on February 26, 1988 by Patrick Sheehy of "Main Board Appointments." Ex. 245.
- An organizational chart dating from 1984 identifies R.J. Pritchard as Deputy Chairman of the Board of BATCo. and serving on their Tobacco Executive Committee, along with E.A.A. Bruell and D.G. Heywood. Ex. 247. He is also listed as the liaison director for the following operating companies: Europe; B.A.T (UK&E); and China. Id.
- E.A.A. Bruell sat on the Board of BAT, and was liaison from the Board to BATIC G.m.b.H.; he also simultaneously was the Chairman of BATCo. and served on the Tobacco Executive Committee there, where he was in charge of Research & Development and Corporate Planning, and directed BATCo's Public Affairs Department. Ex. 248. BAT's 1983 Annual report shows that Bruell was the Deputy Chairman & Managing Director of BATCo. At this same time, he was also a board member of BAT and BATUS. Ex. 249.

Various others worked either simultaneously or successively at B&W and BAT:

- Jerry Grash served as B&W Director of Personnel from September 1, 1966, to March 1, 1985; then served as Group Manager for Staff Development at BAT

from March 1, 1985, to February 23, 1987; and then returned to B&W Operations from March 1, 1987, to April 1, 1995. Ex. 205 at 29.

- F. Anthony Burke worked for B&W from August 1, 1973, to August 1, 1975, as Secretary and Senior Counsel; from March 7, 1989, to August 1, 1992, he worked as Company Secretary for BAT, and then returned to B&W in August 1992 to serve as Vice President and General Counsel. Id.
- James Caudill began in B&W as the Director of Corporate Finance from 1980 to 1983, and then again from 1990 to 1993; in March 1993, he joined BAT as Finance Manager. Id.
- Nicholas Brookes was at BAT in 1993 as the Head of New Business Development, and then moved to become Chairman and CEO of B&W in May 1995. Id.
- R.J. Pritchard served as the Chairman and CEO of B&W from May 15, 1985, to March 31, 1993. During the last three years of his tenure, he also sat on the Board of Directors of BAT. Id. Mr. Pritchard was also a member of the Board of Directors of the Council on Tobacco Research, a defendant in this case. Ex. 244; see also Ex. 250.

The evidence thus indicates that, through exchange of personnel and overlapping directorates, BAT maintained substantial leadership representation and presence at many of its key subsidiaries.

IV. BAT'S ACQUISITION AND OPERATION OF AMERICAN TOBACCO

Public documents show that in late 1994, BAT undertook judicially enforceable obligations to manage the assets of American Tobacco's cigarette manufacturing facility in Reidsville, North Carolina, and to maintain the viability of certain popular American Tobacco brands, pursuant to an agreement with the United States Federal Trade Commission ("FTC"). With BAT's assumption of these obligations, and in connection with the divestiture of some of these brands as well as other relief set forth in the FTC consent order, the FTC approved BAT's acquisition of the former fifth largest tobacco company in the United States. On the same day the

acquisition was approved, BAT "merged" American Tobacco into B&W, but BAT still retains reporting obligations to the FTC under the terms of the order.

Public documents from the FTC proceeding show that on April 26, 1994, BAT entered into a stock purchase agreement to purchase from American Brands all the outstanding shares of American Tobacco. Ex. 251 (Stock Purchase Agreement, appended to Securities and Exchange Filing Form 8-K of American Brands). As part of the acquisition, BAT agreed to assume existing product liability claims against American Tobacco. Ex. 252 (FTC Complaint, ¶¶ 5-6). In October 1994, the FTC initiated proceedings to prevent the acquisition because the transaction as proposed violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Id.^{44/} In late December 1994, attorneys for the FTC negotiated a resolution with BAT, subject to Commission approval. Two agreements were reached -- a proposed Consent Order, approved by the full commission in April 1995, and a Preservation Agreement regarding certain assets of American Tobacco which were to be divested by BAT within twelve months of the Consent Order. Id.^{45/}

Under the terms of the Preservation Agreement, BAT and its wholly-owned subsidiary,

^{44/} The proposed transaction would have brought under common ownership the third and fifth largest cigarette manufacturers in the United States in a highly concentrated market consisting of six meaningful firms. Id. at ¶ 9. All six of the firms -- B&W, American Tobacco, Reynolds, Philip Morris, Lorillard, and Liggett -- are defendants in the present action.

^{45/} Under the terms of the Consent order, BAT acknowledged that it is "engaged in commerce as 'commerce' is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12; BAT also acknowledged that it is a corporation whose business is in or affects "commerce as 'commerce' is defined in Section 1 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44 ("Commerce means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nations, or between the District of Columbia and any State or Territory or foreign nation.").

B&W, agreed to maintain an American Tobacco manufacturing plant in Reidsville, North Carolina, and the viability of certain cigarette brands until the divestiture of these assets as contemplated in the Consent Order. Specifically, BAT agreed that it would

take such actions as are necessary to maintain the viability and marketability of the Reidsville Assets by preventing the destruction, removal, wasting, deterioration, sale, transfer, encumbrance, or impairment of any of the Reidsville Assets except for ordinary wear and tear, and

take such actions as are necessary to maintain the viability and marketability of the ATC Brands Assets by preventing the destruction, sale, transfer, encumbrance, or impairment of any of the ATC Brands Assets.

Ex. 252 (Preservation Agreement, 4.a. and 4.b.). The ATC Brands Assets included cigarettes marketed under the brand names Tareyton, Silva Thins, Tall, MontClair, Riviera, Malibu, Bull Durham, Crowns, and Special Tens. Id. (Application Pursuant to Section 2.41(f) for Prior Approval of Divestiture, n.2, 4). It is indisputable that most, if not all of these brands, were routinely distributed and sold in the District of Columbia, as well as in locations all over the United States. BAT later divested some of these brands to Lorillard. Id.

As part of its continuing obligations under the Consent Order, BAT is obligated to seek the prior approval of the FTC before it directly or indirectly acquires:

any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition, or within the two years preceding such acquisition in the manufacture in the United States of cigarettes for consumption in the United States. . . .

Ex. 252 (Consent Order, Section IV). BAT^{46/} filed a document seeking such prior approval in

^{46/} The submission to the FTC was actually made by British American Tobacco p.l.c., which represented to the FTC that it was "the successor in interest to B.A.T Industries p.l.c." Ex. 253 at 1; see also Ex. 254. In this case, British American was named as an original defendant in the

March 1999 in compliance with the Consent Order. Ex. 253.

The FTC consent order provides evidence of BAT's involvement in the United States cigarette market. BAT agreed to maintain the viability of cigarette brands and to maintain a cigarette manufacturing plant in order to acquire the capital stock of the American Tobacco Company. The evidence also suggests that while some of BAT's legal obligations may have been delegated to B&W, BAT continues to perform its obligations under the Consent Order. See also Ex. 257-258, 248.

Complaint as a successor to BAT Industries. Prior to its dismissal without prejudice to refile, British American "denie[d] that it is successor to B.A.T Industries p.l.c." Joint Report of Parties on Initial Meeting of Scheduling at 5 (Nov. 12, 1999).

